

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

TROUT UNLIMITED; NATIONAL  
WILDLIFE FEDERATION; OREGON  
NATURAL RESOURCES COUNCIL  
FUND; PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
ASSOCIATIONS; INSTITUTE FOR  
FISHERIES RESOURCES;  
FEDERATION OF FLY FISHERS; and  
PACIFIC RIVERS COUNCIL,

Plaintiffs,

and

BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON;  
WASHINGTON STATE FARM  
BUREAU; WASHINGTON STATE  
POTATO COMMISSION; COALITION  
FOR IDAHO WATER; and IDAHO  
WATER USERS ASSOCIATION,

Intervenor-Plaintiffs,

v.

D. ROBERT LOHN, in his official  
capacity as Regional Administrator of  
NMFS Northwest Regional Office; and  
NATIONAL MARINE FISHERIES  
SERVICE,

Defendants.

CASE NO. CV05-1128-JCC

ORDER

1 This matter comes before the Court on the Motion of Plaintiffs Trout Unlimited, *et al.*  
2 (collectively “TU”) for Summary Judgment (Dkt. No. 84), the Motion of Intervenor-Plaintiffs  
3 Building Industry Association of Washington, *et al.* (collectively “BIAW”) for Summary Judgment  
4 (Dkt. No. 94), and the Cross-Motion of Defendants National Marine Fisheries Service, *et al.*  
5 (collectively “NMFS”) for Summary Judgment (Dkt. No. 103). Having considered the briefs of the  
6 parties, the supporting declarations and exhibits, and the administrative record, and having  
7 concluded that oral argument is unnecessary, the Court hereby finds and rules as follows.

## 8 **I. Background**

9 TU brings this challenge to NMFS’s Policy on the Consideration of Hatchery-Origin Fish in  
10 Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead (“HLP”), 70 Fed.  
11 Reg. 37,204 (June 28, 2005). The HLP provides guidance on how hatchery-raised fish are to be  
12 treated when making decisions about whether salmon and steelhead populations should be listed as  
13 endangered or threatened under the Endangered Species Act (“ESA”). The HLP directs that, so  
14 long as they are sufficiently genetically similar, hatchery and wild, or naturally spawning, fish of the  
15 same species will be considered the same “species,” will both be analyzed in decided whether the  
16 species is threatened or endangered, and if so, will both be listed as such. In order to fully  
17 understand this policy and the effect TU alleges it will have on wild salmon and steelhead  
18 populations, it is necessary to understand a bit about the affected species themselves and several  
19 other NMFS policies related to the ESA.

### 20 **A. Salmon and Steelhead**

21 Salmon and steelhead<sup>1</sup> are species of anadromous fish that are well-adapted for their strange  
22 life cycles. Their lives begin when they emerge from eggs deposited in fresh-water rivers and

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23 <sup>1</sup> Five species of salmon are found in the Pacific Northwest—chinook, coho, sockeye, pink, and chum.  
24 (Dkt. No. 84 at 2.)  
25

1 streams: in the Pacific Northwest, those waterways include the Columbia River and its major  
2 tributaries, such as the Willamette River and the Snake River. They live and grow for a year or  
3 more in these fresh-water streams before beginning one of at least two migrations that will occur in  
4 an average life cycle—down to the ocean. Once in the salt water, they feed and mature for between  
5 two and five years, depending on the species. After reaching maturity, adult salmon begin their  
6 second migration, which can be thousands of miles, back to their natal stream. There they compete  
7 for mates, build nests where they deposit and fertilize their eggs, and die. Adult steelhead complete  
8 the same return migration to their freshwater origins, but they are able to survive the spawning;  
9 some spawn a second or even a third time. (Dkt. No. 84 at 2; AR 353.)

10 The long evolutionary history of salmon and steelhead species has resulted in populations  
11 that are genetically and behaviorally diverse. Populations can vary greatly even if geographically  
12 close, depending on the conditions in the natal stream. Despite their ability to survive the  
13 catastrophic events of millions of years of evolution, salmon and steelhead populations have  
14 experienced dangerous declines in numbers since the commencement of European settlement of the  
15 Pacific Northwest, due to habitat degradation and overfishing, among other factors. Accordingly,  
16 NMFS began listing populations as threatened or endangered under the ESA in 1989. Twenty-six  
17 populations of salmon and steelhead are currently listed under the ESA. 70 Fed. Reg. 37,160 (June  
18 28, 2005); 71 Fed. Reg. 834 (Jan. 5, 2006).

## 19 **B. Hatchery Fish**

20 Hatchery-born salmon and steelhead have a different life cycle from salmon and steelhead  
21 that are born in the wild, because a substantial portion of their lives is spent within the hatchery  
22 confines. Hatchery fish are produced by killing returning adult females, harvesting their eggs, and  
23 fertilizing them with the sperm of returning adult males. Young salmon are fed and kept within the  
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1 hatchery for their freshwater growth period. Then they are released to complete their migration to  
 2 the ocean, as wild salmon do. They complete the second migration back to the natal stream and to  
 3 the hatchery, where adults are killed and the assisted fertilization process is repeated. Because  
 4 hatchery fish spend a significant portion of their lives in an ocean environment shared by wild fish,  
 5 and can migrate through some of the same areas, hatchery fish sometimes mate and spawn in the  
 6 wild.

### 7 **C. Other NMFS Policies Related to the ESA**

8 The ESA provides the Secretary of the Interior and the Secretary of Commerce<sup>2</sup> the  
 9 authority to decide whether to list species as endangered or threatened, based on criteria that are  
 10 statutorily set. 16 U.S.C. § 1533(a)(1). “Species” is defined to include “any subspecies of fish or  
 11 wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife  
 12 which interbreeds when mature.” *Id.* § 1532(16). The term “distinct population segment” (“DPS”)  
 13 is not further defined in the statute.

#### 14 **1. 1991 ESU Policy**

15 NMFS issued a policy in 1991 that interpreted the statutory term “distinct population  
 16 segment” as applied to Pacific salmon. *Policy on Applying the Definition of Species Under the*  
 17 *Endangered Species Act to Pacific Salmon*, 56 Fed. Reg. 58,612 (Nov. 20, 1991). In this policy, the  
 18 agency determined that a salmon stock would be considered a DPS only if it was an evolutionarily  
 19 significant unit (“ESU”) of the biological species.<sup>3</sup> In order to be considered an ESU, the salmon  
 20 stock must be (1) substantially reproductively isolated from other conspecific population units, and  
 21 (2) represent an important component in the evolutionary legacy of the species. As to the first

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22 <sup>2</sup> The Secretary of the Interior is authorized to make listing determinations as to terrestrial and freshwater  
 23 species, while the Secretary of Commerce makes listing determinations as to marine and anadromous  
 24 species. 16 U.S.C. § 1532(15).

25 <sup>3</sup> The term ESU is essentially a synonym of DPS, as applied to salmon and steelhead populations.

1 criterion of reproductive isolation, the policy stated that the isolation “does not have to be absolute,  
2 but it must be strong enough to permit evolutionarily important differences to accrue in different  
3 population units.” *Id.* As to the second criterion, the policy defined the evolutionary legacy of a  
4 species as “the genetic variability that is a product of past evolutionary events and which represents  
5 the reservoir upon which future evolutionary potential depends.” *Id.* In other words, “if the  
6 population became extinct, would this event represent a significant loss to the ecological/genetic  
7 diversity of the species?” *Id.* If so, the population represents an important component of the  
8 species’ evolutionary legacy. The term “evolutionarily significant unit” was given a meaning that  
9 focused on genetic factors based on a finding that “a major motivating factor behind the ESA was  
10 the desire to preserve a genetic variability, both between and within species.” *Id.*

## 11 **2. 1993 Interim Hatchery Policy**

12 Two years after issuing the ESU policy, NMFS issued an interim policy on the narrower  
13 question of how hatchery fish should figure into listing decisions under the ESA. *Interim Policy on*  
14 *Artificial Propagation of Pacific Salmon Under the Endangered Species Act*, 58 Fed. Reg. 17,573  
15 (Apr. 5, 1993). The policy envisioned a limited role for hatchery fish and hatcheries in listing  
16 decisions and species recovery efforts. The policy interpreted the ESA as “mandat[ing] the  
17 restoration of threatened and endangered species in their natural habitats to a level at which they can  
18 sustain themselves without further legal protection. For Pacific salmon . . . , the ESA’s focus is,  
19 therefore, on natural populations—the progeny of naturally spawning fish—and the ecosystems  
20 upon which they depend.” *Id.* However, the policy acknowledged that this central purpose of  
21 restoring natural populations in their natural habitats to levels where they are able to sustain  
22 themselves could in some instances be furthered by artificial means, including through the use of  
23 hatcheries. Accordingly:

1 Artificial propagation may represent a potential method to conserve listed salmon  
2 species when the artificially propagated fish are determined similar to the listed  
3 natural population in genetic, phenotypic, and life-history traits, and in habitat use  
4 characteristics. Regardless of this, however, evaluations of the status of the  
5 population under the ESA depend on the viability of the population in the natural  
6 habitat and on the status of ongoing conservation measures.

7 *Id.* at 17,574.

8 The policy underscored the substantial uncertainty about the efficacy of artificial  
9 propagation as a means to increase natural populations, and advised that “consideration of its use  
10 should be based on an objective assessment of the genetic and ecological risks, balancing the  
11 potential for deleterious effects against risk to the population of irreversible harm or extinction if  
12 artificial propagation is not implemented.” *Id.* The policy described the genetic and ecological  
13 risks artificial propagation poses to wild populations. The genetic risks of artificial propagation  
14 include: (1) erosion of genetic variability and reduced fitness in the wild population caused by the  
15 reduction in population attendant with the taking of wild broodstock; (2) reduction in the genetic  
16 differences between natural populations due to the higher straying rates among hatchery fish,  
17 transfers of fish among hatcheries, and transplanting fish outside their natural areas; and (3)  
18 adaptation to hatchery conditions and domestication that causes a genetic divide between the  
19 hatchery population and the natural population and increases the adverse consequences of  
20 interbreeding between the populations. *Id.* The ecological risks include: increased competition and  
21 predation, displacement of natural fish, altered migratory and spawning behavior, and disease  
22 transfer.

23 Having considered these not insubstantial risks that hatcheries pose to the preservation of  
24 natural salmon populations and their habitats, the policy set out guidelines for (1) considering  
25 hatchery fish in making listing determinations, and (2) using hatcheries as a conservation tool in  
recovery plans. As to the first question, the policy reaffirmed the 1991 ESU Policy’s interpretation

1 of the statutory term “distinct population segment” as depending on (1) reproductive isolation, and  
2 (2) contribution to the biological species’ evolutionary legacy. *Id.* Accordingly, “[c]oncurrent with  
3 a determination to list a salmon species under the ESA, a determination should be made whether  
4 any existing hatchery fish can be considered part of the biological ESU and whether or not the  
5 hatchery fish should be included as part of the listed species.” *Id.*

6 Hatchery fish would not be considered part of the biological ESU and therefore would not  
7 be included in the listed species if:

8 (1) the hatchery population in question is of a different genetic lineage than the listed  
9 natural populations,

10 (2) artificial propagation has produced appreciable changes in the hatchery  
11 population in characteristics that are believed to have a genetic basis, or

12 (3) there is substantial uncertainty about the relationship between existing hatchery  
13 fish and the natural population.

14 *Id.* at 17,575. These factors are analogous to the factors of reproductive isolation and evolutionary  
15 legacy listed in the ESU Policy and similarly appear designed to interrogate the genetic similarity  
16 between the hatchery and natural populations.

17 For hatchery fish who were determined to be part of the same ESU as a natural population  
18 based on the genetic relationship, the policy anticipated that a decision must be made as to whether  
19 or not hatchery fish should be included as part of the listed species. It provided that in general,  
20 hatchery fish would not be included as part of the listed species. *Id.* Thus, even if hatchery fish  
21 were determined to be sufficiently genetically related to the natural population to be part of the same  
22 ESU, they were usually not to be included in the listed population and subject to the protections of  
23 the ESA. Only if the hatchery fish were “essential for recovery”—as in cases where the natural  
24 population faced a high short-term risk of extinction, or the hatchery population was believed to  
25 contain a substantial portion of the genetic diversity remaining in the species—would the hatchery

1 fish be listed as well. Thus, the treatment of hatchery fish under the 1993 Interim Hatchery Policy  
2 was keyed to the genetic relationship between the hatchery fish and the natural populations, with a  
3 focus on maintaining the genetic diversity of the natural population.

4 Likewise, the policy counseled that artificial propagation should have a limited role in  
5 recovery efforts. Artificial propagation should only be used when the primary recovery strategy of  
6 addressing the factors that led to a species' decline would not produce recovery within an acceptable  
7 time, and that it should not be seen as a substitute for addressing those underlying factors. In  
8 essence, "artificial propagation should be viewed as a temporary measure, to be held to the  
9 minimum necessary for recovery." *Id.*

10 **3. *Alsea Valley Alliance v. Evans***

11 In 1998, NMFS applied the 1991 ESU Policy and the 1993 Interim Policy in determining  
12 that the Oregon coast ESU of coho salmon should be listed as threatened. *Threatened Status for the*  
13 *Oregon Coast Evolutionarily Significant Unit of Coho Salmon*, 63 Fed. Reg. 42,587 (Aug. 10,  
14 1998). This rule determined that nine Oregon hatchery populations were part of the same ESU as  
15 natural populations of the Oregon Coast coho salmon.<sup>4</sup> However, because none of these hatchery  
16 stocks were essential for the species' recovery, they were not listed as threatened along with the  
17 natural population. *Id.* at 42,589. Accordingly, the species listed as threatened was defined as  
18 "Oregon Coast coho salmon . . . [including] all naturally spawned populations of coho salmon in  
19 streams south of the Columbia River and north of Cape Blanco in Curry County, OR." *Id.* at  
20 42,591.

21 NMFS's listing determination was challenged in Oregon's federal district court. *Alsea*  
22 *Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). Plaintiffs alleged that the distinction

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23 <sup>4</sup> As to four other hatchery populations, NMFS determined that they were either not part of the ESU, or of  
24 uncertain relationship to the ESU. *Id.* at 42,589.



1 between naturally spawned and hatchery fish in the Oregon Coast coho listing rule was “arbitrary  
2 and capricious” in violation of the Administrative Procedures Act, 5 U.S.C. § 706. Plaintiffs argued  
3 that the ESA does not permit NMFS to distinguish between hatchery and wild salmon when making  
4 listing decisions, because it cannot make listing distinctions below that of species, subspecies, or  
5 distinct population segment. 16 U.S.C. § 1532(16). The Court held that the listing determination  
6 was indeed arbitrary and capricious, finding that it relied on factors upon which Congress did not  
7 intend it to rely. *Alsea*, 161 F. Supp. 2d at 1161.

8 The Court reasoned that NMFS’s adoption of the “evolutionarily significant unit” and its  
9 definition in the ESU Policy constituted a “permissible agency construction of the ESA,” because it  
10 relied on factors of geography and genetics, which Congress had indicated were acceptable  
11 considerations. *Id.* However, the Court concluded, based on the ESA’s definition of “species,” and  
12 a single case from the United States District Court of Arizona, *Southwest Center for Biological*  
13 *Diversity v. Babbitt*, 980 F. Supp. 1080 (D. Ariz. 1997),<sup>5</sup> that “distinctions below that of subspecies  
14 or a DPS of a species are not allowed under the ESA.” *Alsea*, 161 F. Supp. 2d at 1162. Once  
15 NMFS determined that hatchery coho and natural coho were part of the same ESU, the Court held,  
16 “the listing decision should have been made without further distinctions between members of the  
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18 <sup>5</sup> *Southwest Center for Biological Diversity v. Babbitt* does not appear to support the point for which it is  
19 cited in the *Alsea* decision. It is cited as support for the Court’s conclusion that “[l]isting distinctions  
20 below that of a subspecies or a DPS of a species are not allowed under the ESA.” *Alsea*, 161 F. Supp. 2d  
21 at 1162. *Southwest Center* concerned whether the United States Fish and Wildlife Service’s Final DPS  
22 Policy—which formed the basis for the denial of a petition to list a DPS of multiple subspecies of northern  
23 goshawk—violated the ESA. The Final DPS Policy stated that “the organisms in a population are members  
24 of a single species or lesser taxon,” which FWS interpreted to require that there be only one subspecies in a  
25 single designated DPS application. 61 Fed. Reg. 4722 (Feb. 7, 1996); *Southwest Center*, 980 F. Supp. at  
1083. The Court rejected that interpretation, and held that “if Congress had intended that a DPS contain only  
one subspecies, it would have allowed only the listing of ‘DPSs’ of subspecies. Instead, the statute reads ‘any  
distinct population segment of any species.’” 980 F. Supp. at 1085. While both cases parse the language of  
16 U.S.C. § 1532(16), reading the statute not to preclude multiple subspecies in one DPS is not the same as  
reading the statute to preclude listing distinctions below that of a subspecies or a DPS of a species.

1 same DPS/ESU.” *Id.* The listing distinction could have been proper, if hatchery and natural coho  
 2 were in separate ESUs, but the Court expressed doubt that this was possible.

3 Here, hatchery spawned coho are likely not substantially reproductively isolated  
 4 from naturally spawned coho because, once released from the hatchery, it is  
 5 undisputed that hatchery spawned coho and naturally spawned coho within the  
 6 Oregon Coast ESU share the same rivers, habitat and seasonal runs. It is undisputed  
 7 that hatchery spawned coho may account for as much as 87% of the naturally  
 spawning coho in the Oregon Coast ESU. In addition, hatchery spawned and natural  
 coho are the same species and interbreed when mature. Finally, the NMFS  
 considers progeny of hatchery fish that are born in the wild as naturally spawned  
 coho that deserve listing protection.

8 *Id.* at 1162–63 (internal citations omitted). Having so concluded, the Court found that the listing  
 9 was arbitrary and capricious and therefore unlawful, and remanded the matter to the agency for  
 10 further consideration. *Id.* at 1163.

#### 11 **4. Final Hatchery Listing Policy**

12 After the *Alsea* decision was issued, NMFS decided to amend the 1993 Interim Hatchery  
 13 Policy.<sup>6</sup> It announced its intention to revise, 67 Fed. Reg. 6215 (Feb. 11, 2002), and on June 3,  
 14 2004, published a proposed policy for the consideration of hatchery-origin fish in ESA listing  
 15 determinations. 69 Fed. Reg. 31,354. With the proposed policy, NFMS announced a 90-day public  
 16 comment period which ended up being extended through November 12, 2004, a total of 162 days.  
 17 70 Fed. Reg. at 37,206. It received over 27,000 comments on the policy. *Id.* In addition, NMFS  
 18 held fourteen public hearings across the Pacific Northwest and California. *Id.* Further, it solicited

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21 <sup>6</sup> NMFS declined to appeal this ruling, and instead submitted to the district court a four-part “Action  
 22 Plan” that involved reformulating listing standards for salmon ESUs that contain both hatchery and wild  
 23 fish and re-evaluating all current listings in light of the new standards. *Alsea Valley Alliance v. Dep’t of*  
 24 *Commerce*, 358 F.3d 1181, 1183 (9th Cir. 2004). Since it was apparent that the ruling would not be  
 appealed, a group of fishery and conservation organizations sought, and were granted, permission from  
 the district court to intervene for the purposes of appealing the district court’s remand order. The Ninth  
 Circuit held that it was without jurisdiction to hear the appeal on the merits, however, concluding that the  
 remand order was not “final,” under 28 U.S.C. § 1291 or relevant case law. *Id.* at 1184.

1 technical review of the policy from over 50 independent experts from a variety of sectors, and  
2 received comments from four. *Id.*

3 In the Final Hatchery Listing Policy, NMFS reaffirmed the commitment of the 1991 ESU  
4 Policy to maintaining genetic diversity by requiring that an ESU be both substantially  
5 reproductively isolated from other conspecific population units, and represent an important  
6 component of the evolutionary legacy of the species. *Id.* at 37,215. However, the Final Hatchery  
7 Listing Policy represented a departure from the Interim Hatchery Policy in that hatchery fish were to  
8 be considered both in determinations as to whether ESUs should be listed, and in any listing of the  
9 ESU of which they are a part.

10 In delineating an ESU to be considered for listing, NMFS will identify all  
11 components of the ESU, including populations of natural fish (natural populations)  
12 and hatchery stocks that are part of the ESU. Hatchery stocks with a level of genetic  
13 divergence relative to the local natural population(s) that is no more than what  
14 occurs within the ESU: (a) are considered part of the ESU; (b) will be considered in  
15 determining whether an ESU should be listed under the ESA; and (c) will be  
16 included in any listing of the ESU.

17 *Id.* at 37,215.

18 Status determinations were to be made with the goal of conserving natural self-sustaining  
19 populations in mind. In making such determinations, NMFS would consider four indicators of the  
20 health of a population: abundance, productivity, genetic diversity, and spatial distribution. *Id.* It  
21 was anticipated that hatchery fish could affect the status of the ESU in both positive and negative  
22 ways:

23 The presence of hatchery fish within the ESU can positively affect the overall status  
24 of the ESU, and thereby affect a listing determination, by contributing to increasing  
25 abundance and productivity of the natural populations in the ESU, by improving  
spatial distribution, by serving as a source population for repopulating unoccupied  
habitat, and by conserving genetic resources of depressed natural populations in the  
ESU. Conversely, a hatchery program managed without adequate consideration of  
its conservation effects can affect a listing determination by reducing adaptive

1 genetic diversity of the ESU, and by reducing the reproductive fitness and  
2 productivity of the ESU.

3 *Id.*

## 4 **II. The Parties and Claims**

5 Plaintiffs are conservation and fishery organizations whose members use the watersheds in  
6 Washington, Oregon, Idaho, and California that are home to the Pacific salmon and steelhead for  
7 recreational, scientific, aesthetic, and commercial purposes. (Dkt. No. 1 at 4.) They allege that the  
8 interests of their members in enjoying continued benefits from the existence of Pacific salmon and  
9 steelhead are directly and adversely affected by Defendants' alleged failures to follow  
10 environmental laws.

11 Defendants are the National Marine Fisheries Service, an agency of the United States  
12 Department of Commerce that is responsible for administering the ESA as to threatened and  
13 endangered marine and anadromous species, and D. Robert Lohn, in his official capacity as  
14 Regional Administrator of the NMFS Northwest Regional Office.

15 Intervenor are trade associations and advocacy organizations who advance agricultural  
16 interests, fight land and water use regulations, and seek to reform environmental laws to make them  
17 compatible with land use, water use, and private property rights. They fear that needless listings of  
18 salmon and steelhead populations will impede their members' livelihoods. (Dkt. No. 24.)

19 TU seeks summary judgment on its claims that NMFS violated the ESA and NEPA in  
20 adopting the HLP. First, TU claims that the HLP violates the ESA by allowing hatchery fish to  
21 dilute the protections available to wild salmon, thus departing from the ESA's central purpose of  
22 protecting self-sustaining populations in their natural habitats. Second, TU claims that NMFS  
23 violated the ESA's mandate that its listing determinations be made "solely on the basis of the best  
24 scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Third, TU claims that  
25

1 NMFS violated NEPA by failing to prepare an environmental impact statement (“EIS”) or an  
2 environmental assessment (“EA”) before adopting the policy.

3 BIAW also seeks summary judgment, arguing that the HLP permits NMFS to draw  
4 distinctions between hatchery and wild salmon that are impermissible under the ESA.

5 NMFS cross-moves for summary judgment, and argues that the ESA claims of TU and  
6 BIAW fail because they are not ripe; NMFS also defends these claims on the merits. NMFS argues  
7 that BIAW’s claim fails because it does not have standing, and because its contentions are meritless.  
8 NMFS argues that TU’s NEPA claim fails because TU does not have standing to pursue it, and that  
9 even if it does have standing, NEPA is inapplicable to the policy as a matter of law.

### 10 **III. Standard of Review**

11 Rule 56 of the Federal Rules of Civil Procedure governs summary judgment motions, and  
12 provides in relevant part, that “[t]he judgment sought shall be rendered forthwith if the pleadings,  
13 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
14 show that there is no genuine issue of material fact and that the moving party is entitled to a  
15 judgment as a matter of law.” Fed. R. Civ. P. 56(c).

16 TU and BIAW seek review of their claims under the Administrative Procedures Act, 5  
17 U.S.C. §§ 551–59, 701–06. Under the APA, an agency’s action may be set aside only if it is  
18 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §  
19 706(2)(A).

### 20 **IV. Analysis**

#### 21 **A. Endangered Species Act Claims**

##### 22 **1. ESA Framework**

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1 Finding that various species of plants, fish, and wildlife of value to the United States and its  
2 citizens had become extinct or were threatened with extinction, Congress adopted the ESA as “a  
3 means whereby the ecosystems upon which endangered species and threatened species depend may  
4 be conserved, [and] to provide a program for the conservation of such endangered species and  
5 threatened species.” 16 U.S.C. § 1531(b). Accordingly, Section 4(a) of the ESA requires the  
6 Secretary to determine whether a species is endangered or threatened because of any of five  
7 specifically enumerated factors:

- 8 (A) the present or threatened destruction, modification, or curtailment of its habitat or  
range;
- 9 (B) overutilization for commercial, recreational, scientific, or educational purposes;
- 10 (C) disease or predation;
- 11 (D) the inadequacy of existing regulatory mechanisms; or
- 12 (E) other natural or manmade factors affecting its continued existence.

13 *Id.* § 1533(a). A species is “endangered” if it is “in danger of extinction throughout all or a  
14 significant portion of its range.” *Id.* § 1532(6). A species is “threatened” if it is “likely to become  
15 an endangered species within the foreseeable future throughout all or a significant portion of its  
16 range.” *Id.* § 1532(20). The Secretary must make a determination as to whether a species is  
17 threatened or endangered “solely on the basis of the best scientific and commercial data available to  
18 him.” *Id.* § 1533(b)(1)(A).

19 When a species is designated as threatened or endangered, the Secretary must also designate  
20 critical habitat, areas essential to the conservation of the species which may require special  
21 management considerations or protections. *Id.* §§ 1532(5)(A), 1533(a)(3). Once a species has been  
22 listed and critical habitat is designated, federal agencies are prohibited from taking actions “likely to  
23 jeopardize the continued existence of any endangered . . . or threatened species or result in the  
24 destruction or adverse modification of [critical] habitat of such species.” *Id.* § 1536(a)(2). The  
25 Secretary must also develop and implement plans for the conservation and recovery of endangered

1 species to the point where they are no longer in need of the ESA's protections. *Id.* §§ 1532(3),  
2 1533(f).

### 3 **2. TU's and BIAW's ESA Claims**

4 TU claims that the HLP violates the ESA by allowing hatchery fish to dilute the protections  
5 available to wild salmon, thus departing from the ESA's central purpose of protecting self-  
6 sustaining populations in their natural habitats. TU also claims that NMFS violated the ESA's  
7 mandate that its listing determinations be made "solely on the basis of the best scientific and  
8 commercial data available." 16 U.S.C. § 1533(b)(1)(A). BIAW argues that the HLP permits  
9 NMFS to draw distinctions between hatchery and wild salmon that are impermissible under the  
10 ESA.

11 NMFS first argues that the Court lacks jurisdiction to consider these claims because they are  
12 not ripe. NMFS also argues that the Court lacks jurisdiction to consider BIAW's claim because  
13 BIAW lacks standing. (Dkt. No. 103 at 19–25.) Because the Court concludes that all the ESA  
14 claims should be dismissed on ripeness grounds, it is not necessary to reach NMFS's standing  
15 argument.

### 16 **3. Ripeness**

17 Ripeness is a justiciability doctrine designed to "prevent the courts, through avoidance of  
18 premature adjudication, from entangling themselves in abstract disagreements over administrative  
19 policies, and also to protect the agencies from judicial interference until an administrative decision  
20 has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*  
21 *v. Gardner*, 387 U.S. 136, 148–49 (1967). In determining whether agency action is ripe for judicial  
22 review, a court must analyze (1) the hardship to the parties of withholding judicial consideration,  
23 and (2) the fitness of the issues for judicial decision. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S.

726, 733 (1998). Factors relevant to the question of fitness include: (1) whether the question is a purely legal one, and (2) whether the regulation disputed is a “final agency action” under the APA, 5 U.S.C. § 704. *Abbott*, 387 U.S. at 149. Showing hardship requires a demonstration that “withholding review would result in direct and immediate hardship and would entail more than possible financial loss.” *W. Oil and Gas Ass’n v. Sonoma County*, 905 F.2d 1287, 1291 (9th Cir. 1990) (internal quotation marks omitted).

The Court cannot discern what hardship might face the parties if the Court declines to review the ESA claims here. TU has brought an independent challenge to an application of the HLP that resulted in the downlisting of the Upper Columbia River steelhead ESU from endangered to threatened. *Trout Unlimited v. Lohn*, CV06-0483-JCC (*Trout II*). *Trout II* includes an identical facial challenge to the HLP. The administrative record in *Trout II* includes documents related not only to the development of the HLP, but also to the application of that policy in the context of the downlisting of the Upper Columbia River steelhead ESU. The Court’s final order disposing of the summary judgment motions in *Trout II* is being issued contemporaneously with this order. The Court elects to consider the parties’ ESA claims in the context of *Trout II*’s fuller administrative record, and finds that *Trout II* precludes TU and BIAW from being able to demonstrate that any hardship will befall them if the Court considers the ESA claims in the context of *Trout II*, as opposed to here. Accordingly, the Court declines to consider the ESA claims on ripeness grounds.

**B. TU’s National Environmental Protection Act Claim**

TU argues that NMFS violated NEPA by failing to prepare an EIS or EA for the HLP. NMFS argues that TU does not have standing to bring this claim, and that even if TU does have



standing, policies providing guidance for ESA listing determinations are exempt from NEPA as a matter of law.<sup>7</sup>

### 1. Standing

To satisfy the constitutional requirements of Article III standing, a plaintiff must demonstrate that:

- (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
- (2) the injury is fairly traceable to the challenged action of the defendant; and
- (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000).<sup>8</sup> An association has standing to bring a claim on behalf of its members when its members would individually have standing, the interests asserted are germane to the purposes of the organization, and neither the claim asserted nor the relief requested requires the individual participation of the members. *Id.* at 181.

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<sup>7</sup> BIAW advances no argument as to the applicability of NEPA.

<sup>8</sup> In addition to satisfying the constitutional standing requirements, TU must also show that the APA statutory standing requirements are satisfied. Specifically, TU must show “(1) that there has been final agency action adversely affecting the plaintiff, and (2) that, as a result, it suffers legal wrong or that its injury falls within the ‘zone of interests’ of the statutory provision the plaintiff claims was violated.” *Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998), *amended by* 158 F.3d 491 (9th Cir. 1998). NMFS does not challenge TU’s statutory standing, but it is clear that the statutory standing requirements are satisfied. The Court has already held that this is a final agency action. (Dkt. No. 27.) It is equally clear that the injuries TU alleges fall within the zone of interested protected by NEPA. NEPA was enacted “‘to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.’ The purpose of NEPA is to protect the environment.” *Nevada Land Action Ass’n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (quoting 42 U.S.C. § 4321). Plaintiffs allege injury to the “recreational, scientific, aesthetic, and commercial benefits [they enjoy] from the existence in the wild of salmon and steelhead.” (Dkt. No. 75 at 6.) These injuries fall within the ambit of the interests protected by NEPA.

1           The Court has no trouble concluding that TU has alleged a sufficiently concrete and  
 2 particularized harm to satisfy the Article III requirement of an injury in fact.<sup>9</sup> For instance, Plaintiff  
 3 Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) is a trade organization of  
 4 commercial fishermen that seeks to protect and restore salmonid habitat as a means to ensure the  
 5 survival of commercial fishing as a way of life. (Dkt. No. 87 at 3.) PCFFA includes associations  
 6 and individual members whose livelihoods depend upon the salmon populations of the Columbia  
 7 River basin. (*Id.* at 4.) PCFFA alleges that the HLP poses a danger to the salmon populations upon  
 8 which their members depend. PCFFA, and the other associational plaintiffs, assert sufficiently  
 9 concrete and particularized injuries on behalf of their members to satisfy the injury in fact  
 10 requirement of Article III standing.<sup>10</sup>

11           In addition to these concrete injuries, TU alleges that it has experienced procedural harms as  
 12 a result of NMFS’s failure to prepare an EIS under NEPA. (*See, e.g.*, Dkt. Nos. 87 at 9–10; 88 at 5;  
 13 89 at 4.) To establish procedural standing, the plaintiff must show: (1) that it has been accorded a  
 14 procedural right to protect its concrete interests, and (2) that it has a threatened concrete interest that  
 15 is the ultimate basis of its standing. *Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir.  
 16 1998). NEPA imposes “procedural obligation[s] designed to assure that agencies give proper  
 17 consideration to the environmental consequences of their actions.” *Merrell v. Thomas*, 807 F.2d  
 18 776, 777–78 (9th Cir. 1986). TU has been accorded a procedural right under NEPA to pursue the  
 19 concrete interests that establish TU’s injuries in fact.

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21 <sup>9</sup> NMFS does not challenge that TU has alleged an injury sufficient to satisfy the first prong of this  
 22 inquiry. Nonetheless, this Court has an independent duty to ensure that the plaintiffs have standing under  
 Article III. *Juidice v. Vail*, 430 U.S. 327, 331 (1977).

23 <sup>10</sup> Where one plaintiff among many has standing, the Court need not consider the standing of the others.  
 24 *Laub v. United States DOI*, 342 F.3d 1080, 1086 (9th Cir. 2003). Likewise, NMFS makes no argument,  
 25 and the Court can discern no reason to find, that the interests asserted by the associational plaintiffs are  
 not germane to the interest of the organization, or that the litigation would require the participation of the  
 individual members.

1 While conceding that the bar is lowered with respect to causation and redressability in  
2 instances of procedural standing, NMFS argues that TU has not shown that the injury it alleges was  
3 caused by NMFS's failure to prepare an EIS, or that the injury can be redressed by requiring NMFS  
4 to comply with NEPA. Specifically, it asserts that TU cannot show that any harm it is experiencing  
5 resulted from NMFS's failure to consider alternatives to the proposed action, as it is required to do  
6 in an EIS, 42 U.S.C. § 4332(2)(C)(iii), because the preamble to the HLP indicates that alternative  
7 approaches were presented in comments on the proposed policy, and considered by the agency. 70  
8 Fed. Reg. at 37,208–09. NMFS argues that because NMFS considered alternative approaches, TU's  
9 harms cannot have been caused by the procedural injury it experienced as a result of NMFS failing  
10 to prepare an EIS. Further, requiring NMFS to prepare an EIS would not redress the injury TU  
11 alleges.

12 The Supreme Court has noted that procedural rights are “special”: “The person who has  
13 been accorded a procedural right to protect his concrete interests can assert that right without  
14 meeting all the normal standards for redressability and immediacy.” *Lujan v. Defenders of Wildlife*,  
15 504 U.S. 555, 573 n.7 (1992). In the Ninth Circuit, once a plaintiff has established an injury under  
16 NEPA, the causation and redressability elements are “relaxed.” *Cantrell v. City of Long Beach*, 241  
17 F.3d 674, 682 (9th Cir. 2001). In cases where procedural harms are alleged, standing can be  
18 established by showing that plaintiffs “have a procedural right that, if exercised, *could* protect their  
19 concrete interests and that those interests fall within the zone of interests protected by the statute at  
20 issue.” *Defenders of Wildlife v. Flowers*, 420 F.3d 946, 953 (9th Cir. 2005).

21 The causation requirement is “only implicated where the concern is that an injury caused by  
22 a third party is too tenuously connected to the acts of the defendant.” *Citizens for Better Forestry v.*  
23 *United States Dep’t of Agric.*, 341 F.3d 961, 975 (9th Cir. 2003). The causation requirement is  
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1 designed to ensure that the plaintiff has haled the proper party into court: it examines “whether it is  
2 substantially probable that the challenged acts of the defendant, not of some absent third party, will  
3 cause the particularized injury of the plaintiff.” *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658  
4 (D.C. Cir. 1996).<sup>11</sup> Because causation concerns only “whether plaintiffs’ injury . . . is dependent  
5 upon [the agency’s] policy, or is instead the result of independent incentives governing [the third  
6 parties’] decisionmaking process,” *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517–18  
7 (9th Cir. 1992), there can be no question that TU has established causation sufficient to pursue its  
8 injury.

9 As for redressability, a plaintiff asserting procedural standing need not demonstrate that  
10 application of the procedure will benefit him. *Cantrell*, 241 F.3d at 682; *Douglas County v. Babbitt*,  
11 48 F.3d 1495, 1501 (9th Cir. 1995) (whether the findings of an EIS would affect the agency action  
12 allegedly requiring one is “not important”). Nor need he show that further analysis by the  
13 government would result in a different conclusion. *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir.  
14 2001). It is sufficient to show that the agency’s decision “could be influenced by the environmental  
15 considerations that NEPA requires an agency to study.” *Id.* The comparison of alternatives  
16 contemplated under NEPA is more extensive than the consideration given by NMFS to the various  
17 comments it received in response to the proposed policy. NEPA requires that the agency  
18 “[r]igorously explore and objectively evaluate all reasonable alternatives,” and “[d]evote substantial  
19 treatment to each alternative considered in detail.” 40 C.F.R. § 1502.14. Accordingly, NMFS’s  
20 argument that the superficial treatment it gave the proposed alternatives received in response to the  
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23 <sup>11</sup> To the extent that *Florida Audubon* imposes more stringent procedural standing requirements than  
24 those imposed in the Ninth Circuit, the Court notes that it is bound by the case law of this circuit: both in  
25 its procedural standing doctrine and in specifically declining to adopt *Florida Audubon*. *Citizens for  
Better Forestry*, 341 F.3d at 974.

1 proposed hatchery listing policy made NEPA compliance redundant is unpersuasive as a basis for  
 2 divesting TU of standing to pursue its NEPA claim.

3 The Court finds that TU has adequately established both Article III and procedural standing,  
 4 and now proceeds to consider the merits of its NEPA claim.

## 5 **2. Merits**

6 NEPA requires that “to the fullest extent possible,” agencies prepare an EIS for any major  
 7 federal action significantly affecting the human environment. 42 U.S.C. § 4332(2)(C).<sup>12</sup> The  
 8 Supreme Court has held that NEPA’s instruction that agencies comply with the EIS requirement “to  
 9 the fullest extent possible” is “neither accidental nor hyperbolic.” *Flint Ridge*, 426 U.S. at 787. The  
 10 House and Senate conferees who drafted the phrase provide guidance as to its meaning:

11 The purpose of the new language is to make it clear that each agency of the Federal  
 12 Government shall comply with the directives set out in [§ 102(2) of NEPA] unless  
 13 the existing law applicable to such agency’s operations expressly prohibits or makes  
 14 full compliance with one of the directives impossible. . . . Thus, it is the intent of the  
 15 conferees that the provision “to the fullest extent possible” shall not be used by any  
 16 Federal agency as a means of avoiding compliance.

17 *Id.* at 787–88 (quoting 115 Cong. Rec. 39703 (1969) (House conferees)); *see also* 115 Cong. Rec.  
 18 40418 (Senate conferees). On the other hand, and as this passage from the legislative history points  
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20 <sup>12</sup> The full text of the statute provides that:

21 [T]o the fullest extent possible . . . all agencies of the Federal Government shall—  
 22 (C) include in every recommendation or report on proposals for legislation and other  
 23 major Federal actions significantly affecting the quality of the human environment, a  
 24 detailed statement by the responsible official on—  
 25 (i) the environmental impact of the proposed action,  
 (ii) any adverse environmental effects which cannot be avoided should the proposal  
 be implemented,  
 (iii) alternatives to the proposed action,  
 (iv) the relationship between local short-term uses of man’s environment and the  
 maintenance and enhancement of long-term productivity, and  
 (v) any irreversible and irretrievable commitments of resources which would be  
 involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2).

1 out, “NEPA was not intended to repeal by implication any other statute.” *United States v. SCRAP*,  
 2 412 U.S. 669, 694 (1973). Accordingly, starting with *Flint Ridge*, courts have found that only  
 3 “clear and unavoidable conflicts in statutory authority” cause the requirements of NEPA to give  
 4 way. *Flint Ridge*, 426 U.S. at 788.

5 Nothing on the face of NEPA excludes “general statements of policy,” such as the HLP,<sup>13</sup>  
 6 from the EIS requirement. “Policies” can be actions that require an EIS if they significantly affect  
 7 the human environment. 40 C.F.R. § 1508.18(a) (“‘Major federal action’ includes . . . new or  
 8 revised . . . policies”); 46 Fed. Reg. 18,026, 18,033 (1981) (“When are EISs required on policies,  
 9 plans or programs? An EIS must be prepared if an agency proposes to implement a specific  
 10 policy.”). Though general statements of policy will usually be subject to the procedural  
 11 requirements of NEPA, the Court concludes that a clear and unavoidable conflict in statutory  
 12 authority exempts such statements of policy under the ESA.

13 Exemptions from the procedural requirements under NEPA fall into two overlapping  
 14 categories—the first focuses on a direct conflict between statutory texts, and the second focuses  
 15 on whether NEPA procedures will be redundant with those provided for under the statute seeking  
 16 exemption. In the first category are three types of cases: First, there are cases in which there is  
 17 an express exemption from the NEPA procedures in the statute itself. *See, e.g., Municipality of*  
 18 *Anchorage v. United States*, 980 F.2d 1320, 1327 (9th Cir. 1992) (holding that “Congress carved  
 19 out an exemption to NEPA for actions taken by the Administrator of the EPA pursuant to the  
 20 CWA”). Second, there are cases in which a time limitation in the statute makes the preparation  
 21 of an EIS impossible. *See, e.g., Flint Ridge*, 426 U.S. at 788–89 (holding that a provision in the  
 22 Interstate Land Sales Full Disclosure Act that requires that a statement of record become

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23 <sup>13</sup> As noted in this Court’s prior order (Dkt. No. 27 at 4–5), the HLP is a “general statement of policy” by  
 24 NMFS’s own assertion. *See, e.g.,* 70 Fed. Reg. at 37,215.

1 effective 30 days after filing unless the Secretary suspends it for inadequate disclosure makes the  
2 preparation of an EIS “inconceivable”); *Westlands Water Dist. v. Natural Res. Def. Council*, 43  
3 F.3d 457, 460 (9th Cir. 1994) (finding that statutory language requiring action “upon enactment”  
4 precluded the imposition of an EIS requirement); *Merrell*, 807 F.2d at 778 (finding that a  
5 requirement in the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) that the EPA  
6 act “as expeditiously as possible” was a time constraint incompatible with preparation of an  
7 EIS). Third, there are cases in which the agency’s action is so limited under the statute that  
8 NEPA considerations cannot factor into the agency’s analysis, making the production of an EIS a  
9 fruitless exercise. *See, e.g., Pac. Legal Found. v. Andrus*, 657 F.2d 829, 836 (6th Cir. 1981)  
10 (“[T]he statutory mandate of ESA prevents the Secretary from considering the environmental  
11 impact when listing a species as endangered or threatened. The Secretary is limited to using the  
12 best scientific and commercial data on the five factors listed in the statute.”); *id.* at 840  
13 (concluding that “Congress intended listing of a species as endangered or threatened to be a  
14 mandatory act dependent upon the five factors found in ESA and not upon environmental impact  
15 concerns found in NEPA”). *Cf. Forelows on Bd. v. Johnson*, 743 F.2d 677, 681 (9th Cir. 1984)  
16 (rejecting an agency’s argument that it should be exempt from NEPA’s requirements where the  
17 agency preserved a great deal of discretion over the actions it argued were mandated by statutes).

18 No party argues that either an express exemption or a time limitation creates a clear and  
19 unavoidable statutory conflict here. Thus, the Court too finds that neither of the first two types  
20 of conflicts applicable to the present case. However, relying on *Pacific Legal Foundation*,  
21 NMFS argues that its discretion is so cabined by the substantive standards laid out in the ESA  
22 that it could not consider the five factors required to be considered in filing an EIS. 657 F.2d at  
23 835. In *Pacific Legal Foundation*, the Sixth Circuit held that NEPA does not require the United  
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1 States Fish and Wildlife Service (“FWS”) to file an EIS before listing a species as an endangered  
2 species pursuant to the ESA. *Pacific Legal Foundation* involved the listing as endangered of  
3 seven species of mollusks found in the Duck River in Tennessee. The listing halted the  
4 completion of the Columbia Dam project by the Tennessee Valley Authority that was designed  
5 to control the water level in the river and provide electricity. The Pacific Legal Foundation  
6 (“PLF”) filed suit alleging that FWS’s failure to file an EIS prior to listing the species was a  
7 violation of NEPA. FWS argued that a clear and unavoidable statutory conflict existed between  
8 NEPA and ESA.

9 The Sixth Circuit concluded that listing determinations under the ESA are exempt from  
10 the procedural requirements of NEPA. It noted that the factors that must be considered in  
11 determining whether a species is to be listed as threatened or endangered are statutorily  
12 enumerated, and that, therefore, the Secretary does not have the discretion to consider the factors  
13 examined in an EIS in making a listing determination.<sup>14</sup> Thus, the Court concluded that the  
14 filing of an impact statement does not and cannot serve the purposes of the ESA. *Id.* at 835.  
15 Accordingly, it made little sense to require the Secretary to comply with the EIS requirement  
16 when ultimately, the determination as to whether to list the species would be controlled by the  
17 factors enumerated in the ESA.

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20 <sup>14</sup> The ESA requires the Secretary to determine whether a species is endangered or threatened because of  
21 any of the following: “(A) the present or threatened destruction, modification, or curtailment of its habitat  
22 or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease  
23 or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade  
24 factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1). By contrast, NEPA requires that an  
25 EIS consider: “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects  
which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action,  
(iv) the relationship between local short-term uses of man’s environment and the maintenance and  
enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of  
resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. §  
4332(2)(C).



1 NMFS argues that this consideration is directly applicable to the present case. In so  
2 doing, it argues that the HLP, as a guidance document designed to assist the Secretary in making  
3 listing determinations, is an inseparable component of those listing decisions. While it is not the  
4 case that a general policy providing guidance on listing determination is indistinguishable from  
5 the listing determinations for all purposes,<sup>15</sup> surely any guidance on listing determinations would  
6 necessarily remain true to the objectives of the ESA<sup>16</sup>—that is, the conservation of endangered  
7 and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). The  
8 purposes of these statutory schemes will often be in harmony, but to the extent that they are not,  
9 the considerations set out in the ESA control, and cabin the Secretary’s discretion in drafting  
10 guidance documents as well as making listing determinations. Thus, the statutory conflict found  
11 by the *Pacific Legal Foundation* Court is equally applicable in the present case.

12 In the second category of exemptions, courts have found that NEPA does not apply when  
13 procedures under another statute “displace” (or make “superfluous”) the NEPA procedures, or  
14 provide the “functional equivalent” of the NEPA procedures. Though both types of arguments  
15 concern a comparison between the procedures provided for in the statute in question and those in  
16 NEPA, functional equivalence doctrine simply looks to the procedures themselves; if they are  
17 sufficiently analogous, they will be held to be functional equivalents. Displacement analysis, on  
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19 <sup>15</sup> For instance, a listing determination is a “rule” subject to notice and comment procedures under the  
20 APA. 16 U.S.C. § 1533(b)(4). General statements of policy, by contrast, are exempt from notice and  
comment procedures. 5 U.S.C. § 553(b)(A).

21 <sup>16</sup> NMFS argues that TU has conceded the tight relationship between the HLP and listing determinations  
22 by invoking the ESA’s “best available science” mandate against the HLP, though that standard  
23 technically only applies to listing determinations. (Dkt. No. 103 at 55.) TU does not provide any basis  
24 for concluding that while the best available science mandate applies to both listing determinations and  
guidance documents, the statutorily-prescribed substantive considerations that limit the Secretary’s  
25 discretion in making listing determinations do not apply to guidance documents. Accordingly, the Court  
concludes that the Secretary’s discretion to consider factors outside those listed in 16 U.S.C. § 1533(a)(1)  
when drafting guidance documents is limited, as it is when making listing determinations.

1 the other hand, attempts to discern whether Congress intended for the statutory scheme to replace  
2 the NEPA procedures; procedures that displace NEPA procedures are not necessarily analogous  
3 to NEPA procedures. *Douglas County*, 48 F.3d at 1504 n.10 (contrasting the displacement  
4 argument, which “asserts that Congress intended to displace one procedure with another” with  
5 the functional equivalent argument, which is that “one process requires the same steps as  
6 another”).

7 The Ninth Circuit has relied on displacement analysis in holding that certain statutes,  
8 including portions of the ESA, are exempt from NEPA. *See id.* at 1503 (ESA’s procedures for  
9 critical habitat designation make NEPA procedures “superfluous”); *Merrell*, 807 F.2d at 778  
10 (legislative history and differences between the two procedural schemes indicate that Congress  
11 intended to displace the NEPA procedures with the carefully crafted compromise procedures in  
12 FIFRA). The Ninth Circuit has also made use of the functional equivalence rationale, though not  
13 entirely without reservation. *See Merrell*, 807 F.2d at 781 (“While we hesitate to adopt the  
14 ‘functional equivalence’ rationale, we are confident that Congress did not intend NEPA to apply  
15 to FIFRA registrations.”); *Anchorage*, 980 F.2d at 1329 (“We are convinced that here . . . the  
16 duties and obligations imposed on the EPA by Congress under the [Clean Water Act (“CWA”)]  
17 will insure that any action taken by the administrator under section 404(b)(1) will have been  
18 subjected to the ‘functional equivalent’ of NEPA requirements.”).

19 The Ninth Circuit has, in fact, applied displacement analysis in concluding that the  
20 procedure Congress imposed in § 4(b) of the ESA for making critical habitat designations was  
21 intended to displace the procedural requirements of NEPA. *Douglas County*, 48 F.3d at 1503.  
22 There, the Court analyzed the legislative history of the 1978 amendments to the ESA, and  
23 concluded that the procedures imposed in 16 U.S.C. § 1533(b) make the NEPA procedure  
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25

1 “superfluous.” *Id.* While *Douglas County* considered only the question of whether NEPA  
2 applies to critical habitat designations under the ESA, the Court notes that the ESA procedures it  
3 held displaced NEPA procedures apply both to critical habitat designations and listing  
4 determinations. Thus, before NMFS takes any action which relies on the guidance provided in  
5 the HLP, it must, pursuant to the ESA:

- 6 (1) publish a notice and the text of the designation in the Federal Register;
- 7 (2) give actual notice and a copy of the designation to each state affected by it;
- 8 (3) give notice to appropriate scientific organizations;
- 9 (4) publish a summary of the designation in local newspapers of potentially  
10 affected areas; and
- 11 (5) hold a public hearing if one is requested.

12 *Id.* (citing 16 U.S.C. § 1533(b)(5)). These procedures are not directly applicable to general  
13 statements of policy under the ESA. However, because NMFS must go through these procedures  
14 before effecting any listing determination or critical habitat designation that relies on the HLP,  
15 the Court is persuaded that the Ninth Circuit’s reasoning in *Douglas County* that the ESA  
16 procedures have displaced those in NEPA is equally applicable to the present case.

17 Moreover, the imposition of the EIS requirement to the HLP would serve neither of the  
18 purposes of NEPA.

19 The NEPA EIS requirement serves two purposes. First, it ensures that the agency,  
20 in reaching its decision, will have available, and will carefully consider, detailed  
21 information concerning significant environmental impacts. Second, it guarantees  
22 that the relevant information will be made available to the larger audience that  
23 may also play a role in both the decisionmaking process and the implementation  
24 of that decision.

25 *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (citation omitted). Thus, the EIS  
has a two-pronged purpose: it is, first, “a procedural obligation designed to assure that agencies give  
proper consideration to the environmental consequences of their actions.” *Merrell*, 807 F.2d at

1 777–78. Second, it insures that the public is informed about the environmental impact of proposed  
2 agency actions. *Douglas County*, 48 F.3d at 1498.

3 It is not clear that requiring NMFS to make a more rigorous investigation into alternative  
4 approaches would ultimately have had any effect on the policy. Though NMFS had concluded  
5 that notice and comment procedures under the APA did not apply to the policy, 70 Fed. Reg. at  
6 37,215, NMFS nonetheless provided notice to the public, sought public comment in a variety of  
7 ways, and addressed the comments that it received, including alternatives that were proposed, in  
8 the preamble to the final HLP. NMFS published an announcement that it was revising the 1993  
9 Interim policy, 67 Fed. Reg. 6215 (Feb. 11, 2002), and two years later, published the proposed  
10 hatchery listing policy. 69 Fed. Reg. 31,354 (June 3, 2004). It opened a comment period  
11 intended to be 90 days long and extended it more than once, ultimately receiving over 27,000  
12 comments from the public over a period of five and a half months. 70 Fed. Reg. at 37,206.  
13 NMFS held fourteen public hearings across the Pacific Northwest and California. *Id.* Further, it  
14 solicited technical review of the policy from over 50 independent experts from a variety of sectors,  
15 and received comments from four. *Id.* The preamble to the HLP discusses the various  
16 alternatives suggested in comments on the proposed policy, and indicates why NMFS did or did  
17 not adopt them. 70 Fed. Reg. at 37,207–14. Thus, there is no indication in the record that  
18 requiring NMFS to draft an EIS, even with its more thorough review requirements, would have  
19 changed the policy eventually adopted. Further, the notice NMFS provided and the period in  
20 which it received comments from the public served NEPA’s second purpose of informing and  
21 receiving input from the public.

22 TU points out that exempting from the NEPA requirements any government action for  
23 which notice and comment procedures under the APA have been followed would dramatically  
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1 undermine the efficacy of NEPA. The Court agrees, and does not hold that all government  
2 actions subjected to notice and comment procedures are exempt from NEPA's procedural  
3 requirements. However, because the public had notice and opportunity to comment on the HLP,  
4 and NMFS considered alternatives proposed in these comments, and because the ESA  
5 procedures that displaced those of NEPA as to listing determinations and critical habitat  
6 designations will apply to any action taken pursuant to the HLP, the Court is persuaded that the  
7 purposes of NEPA have been served in the present case.

8 Another thread that runs throughout the NEPA exemption cases is consideration of  
9 whether NEPA's purposes are in harmony with the purposes of the statute alleged for which a  
10 NEPA exemption is being sought. Courts are more likely to find a NEPA exemption if the  
11 arguably exempt statute is designed to protect the environment. Saliently, the decisions  
12 exempting NMFS and the FWS from NEPA when making listing determinations and critical  
13 habitat designations under the ESA, have cited the shared, conservationist purposes of NEPA  
14 and the ESA as a reason for not applying NEPA. *Pac. Legal Found. v. Andrus*, 657 F.2d at 837  
15 ("To require [the Secretary of the Interior] to file an impact statement would only hinder its  
16 efforts at attaining the goal of improving the environment"); *Douglas County*, 48 F.3d at 1506  
17 ("We also find that NEPA does not apply to the designation of a critical habitat because the ESA  
18 furthers the goals of NEPA without demanding an EIS."); *see also Anchorage*, 980 F.2d at 1329  
19 ("The purpose of NEPA is to ensure that federal agencies consider the environmental impact of  
20 their actions. Under the CWA, Congress has charged the Administrator of the EPA with the duty  
21 of cleaning up the nation's navigable waters. We are convinced that in the circumstances of this  
22 case an exemption from NEPA will facilitate the EPA's efforts to clean up the nation's waters  
23 while the statutory duties placed on EPA by Congress under the CWA properly ensure that the  
24  
25

1 Agency will consider the environmental impact of its actions.”). *But see Jones v. Gordon*, 792  
2 F.2d 821, 826–27 (9th Cir. 1986) (finding that requiring an EIS before issuing a permit to catch  
3 killer whales “neither circumvents the language of the [Marine Mammal Protection Act] nor  
4 violates its purpose; rather it promotes the predominant congressional purpose in enacting the  
5 MMPA—the protection of marine mammals.”).

6 The present case places the Court “squarely on the horns” of a dilemma. *Anchorage*, 980  
7 F.2d at 1328. When applied to environmental statutes, NEPA’s procedural requirements are  
8 often seen as a hindrance to the effective implementation of those statutes’ conservationist  
9 purposes. Indeed, in *Pacific Legal Foundation*, the Sixth Circuit expressed concern that  
10 applying NEPA’s procedural requirements to listing determinations under the ESA might permit  
11 NEPA to become “more of an obstructionist tactic to prevent environment-enhancing action than  
12 it may already have become.” 657 F.2d at 838. After considering the legislative history, that  
13 court concluded that “NEPA was not intended to be applied to agencies whose function was to  
14 protect the environment.” *Id.* In the present case, however, the usual scenario is reversed. The  
15 party asserting the conservationist interests is also the party calling for the application of the  
16 “slow down” NEPA procedures to be applied. The Ninth Circuit confronted a similar dilemma  
17 when asked to provide a complete exemption from NEPA for the EPA.

18 A complete exemption from NEPA requirements would enable EPA to act more  
19 expeditiously in fulfilling its purpose of protecting the environment. Thus, as has  
20 been recognized, completely exempting EPA from NEPA seems to best serve the  
21 objective of protecting the environment which is the purpose of NEPA. However, it  
22 cannot be assumed that EPA will always be the good guy. Indeed, some have  
23 suggested that a complete exemption from NEPA requirements for EPA will result in  
24 no one policing the police.

25 *Anchorage*, 980 F.2d at 1328 (citations omitted).

1 In the present case, the Court is persuaded that the decision to exempt the HLP from NEPA  
2 procedures does no harm to the shared conservationist purposes of NEPA and the ESA. NEPA  
3 advances its environmental purpose via limited procedural guarantees. When, as here, those  
4 procedures have been displaced by the procedures found in another environmental statute, and a  
5 direct statutory conflict exists, *Pacific Legal Foundation*, 657 F.2d at 836, the conservationist  
6 purpose of NEPA is not extinguished; it merely finds expression elsewhere. The procedural  
7 guarantees in the ESA adequately ensure that the HLP will be applied in a way that is consistent  
8 with the ESA's fundamentally environmentalist purpose—the conservation of endangered and  
9 threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b).

10 **C. Motion to Strike**

11 Because this decision does not rely on the documents NMFS seeks to strike, it is  
12 unnecessary at this time to consider whether they should be stricken.

13 **V. Conclusion**

- 14 (1) Defendants' Motion for Summary Judgment (Dkt. No. 103) is GRANTED;  
15 (2) Plaintiffs' Motion for Summary Judgment (Dkt. No. 84) is DENIED; and  
16 (3) Intervenor-Plaintiffs' Motion for Summary Judgment (Dkt. No. 94) is DENIED.

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18 SO ORDERED this 13th day of June, 2007.

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22 THE HONORABLE JOHN C. COUGHENOUR  
23 UNITED STATES DISTRICT JUDGE  
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